Supreme Court, U.S.
FILED
JUN 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1931

DANNY BILL SANDER, a/k/a DANNY SANDER,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD D. ESPER
MITCHELL ESPER,
Attorneys for Petitioner
1100 Montana Ave., Suite 201
El Paso, Texas 79902

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Citations to Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 3

Reasons why the Writ Should be Granted 5

Conclusion and Prayer 11

Certificate of Service 12

Appendix A — Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Sander*, 615 F.2d 215 (1980) 1a

Appendix B — Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing En Banc 12a

Appendix C — Order of Two Hundred Forty Third District Court, El Paso County, Texas .. 20a

TABLE OF AUTHORITIES

Cases: Page

Hickman v. Taylor, 329 U.S. 495 (1947) 7

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 75 L.Ed.2d 290 (1978) 7

O'Connor v. Johnson, 26 Crl 2221 (1979) 6,7,8

United States v. Franklin, 598 F.2d 954 (5th Cir. 1979) 9

United States v. Levy, 577 F.2d 200 (3d Cir. 1978) 10

United States v. Morrison, 602 F.2d 529 (3d Cir. 1979) 10,11

United States v. Sander, 615 F.2d 215 (5th Cir. 1980) 2,5

Via v. Cliff, 470 F.2d 271 (3d Cir. 1972) 10,11

Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) 10

Statutes and Rules:

18 U.S.C. §1254 2

Supreme Court Rule 22 2

Other Sources:

United States Constitution, Amendment VI 2,3,5,6,8,10

Cannon 4, American Bar Association Code of Professional Responsibility 9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

DANNY BILL SANDER, a/k/a DANNY SANDER,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, DANNY BILL SANDER, respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 7, 1980.

CITATIONS TO OPINIONS BELOW

The Petitioner was indicted in the United States District Court for the Western District of Texas on Jan-

uary 18, 1979, charging him with attempting to obstruct and obstructing commerce through the wrongful use of actual and threatened fear of economic loss in violation of 18 U.S.C. §1951. After a jury trial, Petitioner Sander was convicted and sentenced to a term of seven years imprisonment. Petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the conviction on April 7, 1980. This opinion was reported as *United States v. Sander*, 615 F.2d 215 (1980), and reproduced herein as Appendix A. The Court of Appeals subsequently denied Petitioner Sander's Petition for Rehearing on May 9, 1980. This result was reported as *United States v. Sander*, and reproduced herein as Appendix B.

JURISDICTION

The opinion of the Court of Appeals, holding that Petitioner's Sixth Amendment rights were not violated is made the subject of this Petition. Jurisdiction of this Court is invoked under the authority of 28 U.S.C. §1254, the Sixth Amendment to the United States Constitution, and Supreme Court Rule 22.

QUESTION PRESENTED

Whether Petitioner's Sixth Amendment rights were violated when police authorities were allowed to search the files of Petitioner's deceased attorney, thereby violating the attorney-client privilege.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution Amendment VI provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense. . .

STATEMENT OF THE CASE

Subsequent to Petitioner's arrest, but prior to his Indictment, Petitioner retained the legal services of Mr. Lee A. Chagra. Approximately ten (10) days later, Mr. Lee A. Chagra was murdered in his law office. For the next five (5) days thereafter, detectives of the El Paso Police Department sealed off Mr. Chagra's law office and allowed no one access to these offices unless by authority of the detective in charge of the investigation. However, these detectives did allow two (2) agents from the Drug Enforcement Administration and two (2) agents from the Internal Revenue Service access and allowed them to rummage through and search active files of the deceased attorney.

When the offices of the deceased attorney were finally released to family and friends, it was discovered that

numerous files had been searched, as well as copies made of contents of files. One of these files belonged to Petitioner Sander. However, since no one had been present during this five (5) day excursion, it was impossible to determine what files were looked through, which contents of files had been photocopied or had notes taken therefrom, etc.

Prior to Petitioner's trial, he filed a Motion to Dismiss the Indictment because his right to counsel, as well as the attorney-client privilege, had been abridged by the actions of agents of the State of Texas as well as the Federal Government. At a hearing on March 6, 1979, Petitioner testified that at the time of his arrest, he had written a two (2) page deposition type document detailing his participation in the offense, and had given it to Mr. Chagra, and that upon his release from custody and upon Mr. Chagra's office being released by the police, said statement was not in Petitioner's file. The agents who were present during the search of Mr. Chagra's offices, denied seeing any such statement. However, it is clear that Petitioner gave his deceased defense attorney said statement for the purpose of aiding in his defense.

The United States District Court for the Western District of Texas denied the Motion to Dismiss and Petitioner proceeded to trial and was convicted.

A. The Decision Of The Fifth Circuit

Regarding the search of files at Petitioner's deceased attorney's office, the Court of Appeals commented:

> Where there is intrusion on the attorney-client relationship the remedy for such a violation is not dismissal but the suppression of any evidence so obtained. *Sander,* Supra, at 219.

Regarding the question of showing an intrusion into the attorney-client relationship, the Court of Appeals noted:

> Appellant Sander made no showing of injury or prejudice because of the fact that his file at his attorney's office was viewed by the El Paso Police. *Sander,* supra, at 219.

The Court of Appeals thus asserted that Petitioner was to be stradled with the difficult burden of showing prejudice or injury before he was entitled to relief, and it is this specific holding that the Petitioner questions in this Petition for Certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

Whether This Petitioner's Sixth Amendment Rights Were Violated When Police Authorities Were Allowed To Search His File

And Others During The Murder Investigation Of His Deceased Attorney, Thereby Violating The Attorney-Client Privilege.

A. Invasion Of The Attorney-Client Privilege.

How can this Petitioner's Sixth Amendment rights not be violated when police, as well as government agents, are allowed access to his deceased attorney's offices and thereafter begin an intensive search through the deceased attorney's files under the guise of looking for possible murder suspects, when in reality they were taking the opportunity to gain information on clients of the deceased attorney, a well known criminal defense lawyer. Such conduct clearly threatens and is in violation of a number of important rights and privileges — the attorney-client privilege, the work product doctrine, client confidentiality between attorney and client and the Defendant's Sixth Amendment right to counsel. A police search through an attorney's files infringes the rights not only of the attorney and Petitioner, but also those of all the attorney's clients. *O'Connor v. Johnson,* 26 Crl 2221 (1979).

The attorney-client privilege embodies the common law privilege that has long been universally accepted as indispensible to an attorney's professional relationship with his client. This relationship of trust between client and attorney and the adequate functioning of our adversary system of justice can only be ensured when the client can completely disclose all the

facts — favorable and unfavorable — without the fear that his attorney's files will be searched or seized by police officers.

To protect confidential communications between an attorney and his client, the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), developed a qualified privilege preventing an attorney's work product from being discovered. If police are permitted to search through an attorney's files for documents and information pertaining to a murder, the protection afforded an attorney's work product will be destroyed.

Even though the police had the authority to conduct a limited search of the offices of Mr. Chagra to find possible clues in a homicide, the blatant search of files was not justified. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 190 (1978). To allow the police to conduct the type of search that was done in this case would clearly destroy the fairness and integrity of our system of justice. The general and exploratory search that was conducted of all of the deceased attorney's files was not to look for possible homicide suspects, but to gain information. The spending of five (5) days in Mr. Chagra's offices is supportive of this contention. It does not take police officers that length of time to find possible clues.

This situation is analogous to that in *O'Connor*, where officers were attempting to use a search warrant to find documents in an attorney's files. There, the Court said:

> "Even the most particular warrant cannot adequately safeguard client confidentiality, the attorney-client privilege, the attorney's work product and the criminal defendant's constitutional right to counsel of all the attorney's clients. It is unreasonable, in any case, to permit law enforcement officers to peruse miscellaneous documents in an attorney's office while attempting to locate documents listed in a search warrant. Even if it were possible to meet the particularity requirement regarding the place to be searched, the file would still contain some confidential information that is immune from seizure under the attorney-client privilege or the work product doctrine. Once that information is revealed to the police, the privileges are lost, and the information cannot be erased from the minds of the police." *O'Connor*, supra.

Petitioner contends that although police had a limited right to look for clues in a homicide, they exceeded the bounds of their authority when they began rifling through files that were clearly confidential.[1] The police sought no advice as to what authority they possessed in conducting a search of this nature, but instead, seized the opportunity to rummage through files in total disregard for an individual's Sixth Amendment rights.

---

1 See Appendix "C", Order of the 243rd District Court, El Paso County, Texas.

Canon 4, *American Bar Association Code of Professional Responsibility*, require a lawyer to preserve the *"confidences and secrets"* of a client. It is sometimes overlooked that the effectiveness of the attorney-client relationship depends not only upon the sanctity of privileged communications, but the client's ability to place all his secrets before counsel. When Petitioner, in his own handwriting, detailed his alleged involvement in the offense for which he was convicted and placed it in the hands of Mr. Chagra, he was giving him his *trust* and *"secrets"*. When Petitioner was forced to hire another attorney after Mr. Chagra's death, and this two (2) page written document could not be found in his file, Petitioner had at that point been injured.

B. How Could Petitioner Realistically Show Injury Or Prejudice Because Of The Conduct Of Police.

The holding of the Fifth Circuit, which required a showing of injury or prejudice to Petitioner, is realistically an impossible burden. *United States v. Franklin*, 598 F.2d 954 (5th Cir. 1979). It would be impossible to show actual injury to Petitioner because he was not present in his deceased attorney's office when this rifling of files was being done. Therefore, he would not be able to ascertain what information was gained by police and thereafter disseminated to other authorities. The only injury that Petitioner can realistically present, *aside from a violation of the attorney-client privilege*, is that when the said hand written document was not found, Petitioner is placed in a perilous position prior to his trial. Does he

testify in his own behalf knowing that the Government might have this statement in their possession? Can he adequately prepare his defense with this important information in the hands of the prosecution? Only a negative answer suffices. The injury or prejudice in this vein is clearly present. Only a dismissal of the indictment can afford Petitioner adequate relief.

A showing of injury is not required in all cases. A showing that the police effected a willful and unjustified interference with a defendant's Sixth Amendment right to counsel is sufficient to warrant a dismissal. *United States v. Morrison*, 602 F.2d 529 (3rd Cir. 1979). Moreover, if the interference was either wrongly motivated or without adequate justification, it constitutes an infringement of the constitutional right to counsel. *Via v. Cliff*, 470 F.2d 271 (3rd Cir. 1972).

The holding of the Fifth Circuit discusses *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), as controlling of the situation here. However, the facts in *Weatherford* clearly demonstrate that the interference of the attorney-client relationship in that case were not wrongly motivated or without justification. In the case at bar, the interference into Petitioner's relationship with his deceased attorney was clearly without adequate justification. In light of the fact that no other relief would remedy the violation, and considering the extent and seriousness of the improper conduct of the government, the only appropriate relief for the violation is dismissal of the indictment. *United States v. Levy*, 577 F.2d 200 (3rd Cir. 1978).

In light of *Via* and *Morrison*, the challenged conduct represents not only an *"inadequately justified"* but a thoroughly unjustified and wrongly motivated interference with the attorney-client relationship, and constitutes a violation of the Petitioner's Sixth Amendment right to effective assistance of counsel.

CONCLUSION AND PRAYER

The question presented here is a clear, crisp and definite legal issue uncluttered by ambiguous positions. If the holding of the United States Court of Appeals for the Fifth Circuit is allowed to remain the law within that circuit, Defendants such as this Petitioner will suffer from the overzealousness of police officers who have little regard for the attorney-client privilege. The deliberate undermining of constitutional rights must not be countenanced. This is particularly so when, as here, the matter will come to the attention of the courts only when the importuning of the government agents is unsuccessful. There is, therefore, real danger that the courts themselves may become the unwitting instrumentality through which government agents may interfere with basic constitutional rights.

Respectfully submitted,

RICHARD D. ESPER
Attorney for Petitioner
1100 Montana Ave., Suite 201
El Paso, Texas 79902
(915) 533-3494

MITCHELL ESPER
Attorney for Petitioner
1100 Montana Ave., Suite 201
El Paso, Texas 79902
(915) 533-3494

CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, Danny Bill Sander, hereby certifies as follows:

a) That I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition For Writ of Certiorari, as hereinafter shown:

b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Jamie C. Boyd
United States Attorney
U.S. Attorney's Office
655 E. Durango Blvd.
Hemisfair Plaza
San Antonio, Texas 78206

c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Wade H. McCree, Jr., and the said Jamie C. Boyd, attorneys for said Respondent, by depositing same in the United States Post Office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED this ____ day of June, A.D. 1980.

RICHARD D. ESPER
Attorney for Petitioner
1100 Montana Ave., Suite 201
El Paso, Texas 79902
(915) 533-3494

MITCHELL ESPER
Attorney for Petitioner
1100 Montana Ave., Suite 201
El Paso, Texas 79902
(915) 533-3494

APPENDIX "A"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DANNY BILL SANDER, a/k/a DANNY SANDER,
Defendant-Appellant.

No. 79-5236

United States Court of Appeal,
Fifth Circuit.

April 7, 1980

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

Appellant, Danny Bill Sander, a/k/a Danny Sander was convicted of violation of 18 U.S.C. §1951 (Hobbs Act) by a jury. The indictment charged him with obstruction of Interstate Commerce by extortion.

Appellant Sander complains in this appeal of the sufficiency of the evidence to show the two essential elements of the statute under which he was convicted. First, he claims that the evidence was insufficient to show that what he did had an effect on Interstate Commerce and secondly, that the proof failed to show that he put the alleged victim of the extortion, one Knapp, in fear, either actual or economic. He also complains of the District Court's failure to grant a dismissal of the indictment because of breach of his right to counsel. All of his contentions are without merit and we affirm his conviction.

In order to dispose of his insufficiency of the evidence claims, it is necessary to outline the evidence presented at his trial.

D & B Development, a partnership owned by Richard Arthur Knapp of El Paso, Texas, a his brother Robert Knapp of Englewood, Colorado, acquired a six mile square tract of land on North Franklin Mountain in El Paso County, Texas, for various areas of development. The tract that was to be developed is known as the Tine Mine. Sometime in June of 1978, D & B Development started earth moving operations on this six mile tract of land. In addition to earth moving, D & B built roads and dams and developed subdivisions. D & B intended to construct six communication towers on top of Franklin Mountain, develop land quarries and a landfill, mine for tin, and also intended to

build stables and a resort lake. Eventually, they intended to put in 1200 acres of residential area.

In the process of developing this six mile tract of land, D & B Development purchased some $400,000 worth of tractors and equipment from Rust Tractor Company of Albuquerque, New Mexico. Exploration services on the tract were provided by California Exploration Corporation of Laguna Beach, California. A water well on the project was drilled by Agua Drilling Company of Anthony, New Mexico. D & B Development also used a consulting engineer from Boulder, Colorado. Cooper Aerial Survey Company of Tucson, Arizona, made the aerial topography maps for the project. The partnership also used the services of a California attorney on condemnation problems.

When the development started, the land could be used for all the projects contemplated by D & B Development. However, in October of 1978, the land was annexed by the City of El Paso and the six mile tract of land was rezoned for residential purposes only. The rezoning made it virtually impossible for D & B Development to continue its operations and to do what they had intended to do with the land on which operations they had already spent large sums of money, some "two or three million dollars."

At the time of the annexation D & B Development requested the City Planning Commission to zone the land so as to permit them to continue their operations.

The City Planning Commission, however, denied the request and zoned the land for residential purposes only. The only alternative remaining to D & B Development was to apply to the Zoning Board of Adjustment for a two year temporary use permit. The temporary use permit would permit D & B Development to continue their on-going operations despite the restrictive residential zoning given to the tract by the City Planning Commission. Their request for the temporary use permit was to be considered by the Zoning Board of Adjustment on December 11, 1978.

Some ten days before the Zoning Board was to consider the temporary application, Appellant Sander contacted Richard Arthur Knapp and talked to him about the difficulties that they were encountering with their zoning problem. He offered to contact people on the Zoning Board to take care of the problem if Knapp were interested. Knapp, however, told Sander that he would consider his offer. A few days later, Appellant Sander again called Knapp to see what Knapp had decided. Up to that time Knapp had not taken Appellant's offer seriously. However, the day before the hearing on the temporary use permit, Knapp began seriously considering Appellant's offers of assistance. He wanted to get through to the people that he considered had been "giving him the heat." Richard Arthur Knapp felt that he would not be given fair treatment by the Zoning Board of Adjustment should he not submit to Sander's plan, something that would result in severe financial

harm to him. He decided to discuss Sander's offer with his attorney, and agreed with him to contact the legal authorities. Knapp and his attorney met with the authorities and it was agreed that he would place recorded telephone conversations to Appellant Sander. These recorded telephone conversations were later played to the jury during the trial. During one of these telephone conversations, it was agreed that Sander would contact his source and learn how much was required to insure that the permit sought by D & B Development would be granted by the Zoning Board of Adjustment. Appellant Sander told Knapp that the price would be $10,000 and that this would ensure that D & B Development would receive two or three favorable votes from the Zoning Board of Adjustment. Sander informed Knapp that $4,000 would go to someone "higher up," $2,000 would go to each of the two additional members, and he, himself, would earn $2,000 which he said he would return to Knapp. In the last recorded telephone conversation, Knapp and Sander confirmed their agreement and Knapp told him to go ahead and that he would supply the $10,000. It is not clear whether or not Appellant Sander was present when the temporary use permit was being discussed, but Knapp did see him at the City Hall the day of the hearing. The vote on the application for the temporary use permit was favorable and D & B Development received the permit to continue operating. Knapp had agreed to pay Sander the money after the favorable vote was entered and he spoke to Sander on the tele-

phone and in person about it. The conversations between Knapp and Sander after the favorable vote were again recorded. During these conversations Appellant Sander informed Knapp that he "may get some grief down the line," if he did not pay the money and that the Zoning Board "could back this thing up through channels" and cause "all kinds of waives and problems."

It was finally agreed that Knapp would leave the $10,000 in a brown envelope at his office for Sander to collect. Knapp obtained the money, $10,000 in $100 bills, from the El Paso Police Department. Sander did come to the office of Knapp and left his office carrying the brown envelope. As Appellant Sander was leaving Knapp's office carrying the brown envelope, he was arrested and he was found in possession of the $10,000 in marked bills. After Sander was advised of his rights, he told the officers that he was only the middle man, he could deliver one or two members of the Zoning Board on a "silver platter," and that he was in the scheme for compensation.

On appeal, Appellant Sander's challenges to the sufficiency of the evidence to establish the effect of his actions on interstate commerce and the fear of the victim of the extortion scheme must be viewed in the light most favorable to the verdict with all reasonable inferences and credibility choices made to support it. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). Since no motion for acquittal was made at the end of the government's evidence, this Court's review of the evidence is limited to a determination of whether there has been a manifest mis-

carriage of justice. *United States v. Bourg*, 598 F.2d 445, 448 (5th Cir. 1979). The evidence in this case fails to show a manifest miscarriage of justice.

The Hobbs Act, 18 U.S.C. §1951 is a broadly drawn statute. The cases construing the Act have repeatedly emphasized that the Congress in passing the statute wanted to use all of the constitutional power it had to punish interference with interstate commerce by extortion, robbery or physical violence. The plain terms of the statute outlaw interference with interstate commerce "in any way or degree." *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). This Court had an opportunity recently to review the Hobbs Act in *United States v. Summers*, 598 F.2d 450 (5th Cir. 1979). In that case, this Court held that all that is necessary is that the impact of the extortion affect interstate commerce to a minimal degree and that doing business with out of state companies and the purchase of goods out of state have been held sufficient to establish an interstate nexus so as to provide the victim with the protection of the Hobbs Act. The evidence in this case was ample to show that D & B Development was doing business with out of state companies and purchasing goods from them before and during the time period of the extortion. At the time of the extortion, D & B Development Corporation was an on-going business, and it is realistic to assume that D & B Development Corporation would continue to conduct business on an interstate basis. Consequently, there was sufficient

evidence that Sander's extortionate conduct had some effect on interstate commerce and was likely to have the natural effect of obstructing interstate commerce in the future, *U.S. v. Carpenter*, 611 F.2d 113 (5th Cir. 1980); *U.S. v. Summers*, supra, 598 F.2d at 454-455. The Court below properly charged the jury that if they believed the evidence with regard to the dealings of D & B Development with firms outside of Texas that then they could find that Sander's actions had an effect on interstate commerce. This apparently the jury found by their verdict.

Appellant Sander argues that he never threatened Knapp, and consequently that the element of fear, a required element of the Hobbs Act, was not present. Fear of economic loss is covered by the Hobbs Act. The case law is also clear that the government did not have to show either that the fear was a direct consequence of the threat of economic loss or that Knapp personally feared Sander. *United States v. Quinn*, 514 F.2d 1250, 1266-67 (5th Cir. 1975), cert. denied, 424 U.S. 955, 96 S.Ct. 1430, 47 L.Ed.2d 361 (1976). Subtle extortions are covered under the Hobbs Act, and the government satisfied its burden of proof if it showed circumstances surrounding the alleged extortionate conduct that rendered the victim's fear of threatened loss reasonable.

The evidence at trial showed that Sander did threaten Knapp with economic loss if he failed to supply the promised bribe money. Sander telephoned Knapp sub-

sequent to the favorable vote on the application for the temporary use permit. During these conversations, he informed Knapp that failure to pay might result in "some grief down the line," and that the Zoning Board "could back this thing up through channels" and cause "all kind of waives and problems." At that point, if not when Sander first approached Knapp with his offer to bribe the El Paso Zoning Board, Knapp realized that any unfair treatment from the Zoning Board would stem from failure to comply with Sander's request for the payment of the bribe money. Prior to Sander's demand for payment, Knapp may have feared economic loss from a decision by the Zoning Board not to approve the application for a temporary use permit. At that point, however, Knapp's fear of economic loss focused upon Sander's demand for payment, and his belief that payment of the money would prevent the feared economic injury is reasonable in light of the surrounding circumstances. The facts also show that Knapp faced a potential loss of millions of dollars, and Sander's threat of economic loss, at least indirectly, if not directly, induced Knapp to part with the money to prevent such threatened economic loss.

Sander's final allegation is that his Sixth Amendment right to counsel was violated when detectives of the El Paso Police Department examined his file at his attorney's office. He argues that his motion to dismiss the indictment should have been granted. A hearing on

this motion was held by the Court below outside of the presence of the jury. The evidence presented on the motion showed that Appellant Sander had retained the services of an attorney by the name of Lee Chagra to represent him on the extortion charge. Some ten days later, attorney Chagra was murdered in his office. The El Paso police assumed custodial possession of Chagra's office for the next five days. Detective Lattimer of the El Paso Police Department testified that while interviewing Chagra's secretaries, Sander's name came up as a possible suspect. His file was procured. Lattimer glanced through it looking for addresses and any connection to the murder. Even though Sander testified that he had given Chagra a handwritten statement, Lattimer testified that he had seen no such handwritten document and a typewritten statement that was in the file was left there, and Sander received that typewritten document before his trial below. Lattimer also testified that he did not discuss anything he saw in the file with any federal agents and that no evidence was supplied to the government by Lattimer. Nothing that was in his attorney's file was ever used by the government in this case.

Where there is an intrusion on the attorney-client relationship the remedy for such a violation is not dismissal but the suppression of any evidence so obtained. *United States v. Kilrain*, 566 F.2d 979, 982 (5th Cir. 1978), cert. denied, 439 U.S. 819, 99 S.Ct. 80, 58 L.Ed.2d 109. *United States v. Franklin*, 598 F.2d 954, 957

(5th Cir. 1979). Appellant Sander made no showing of injury or prejudice because of the fact that his file at his attorney's office was viewed by the El Paso police and the Court below properly denied his motion to dismiss.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

May 9, 1980

TO ALL PARTIES LISTED BELOW:

No. 79-5236 — U.S.A. v. DANNY BILL SANDER

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ Sally Hayward
Deputy Clerk

APPENDIX "C '

IN THE DISTRICT COURT OF
EL PASO COUNTY, TEXAS
TWO HUNDRED FORTY THIRD
JUDICIAL DISTRICT

No. 32771-243

COURT OF INQUIRY IN THE MATTER:
LEE A. CHAGRA, Deceased.

ORDER

On January 24, 1979, this Court did institute this action convening a Court of Inquiry to investigate possible misconduct in connection with the investigation of the death of LEE A. CHAGRA. The Court of Inquiry was called as the result of concern which was expressed in a resolution by the Board of Directors of the El Paso Bar Association (attached).

On January 29 and 30, 1979, this Court did receive certain evidence regarding the conduct of the investigation. All that evidence was received, except for the affidavit of Joel Robert Yoseph, which is ordered stricken due to the fact that this Order is being rendered prior to the time that written cross-questions are answered by Mr. Yoseph.

I.

Factual Statement

From the testimony and exhibits received, this Court finds the following: On December 23, 1978, attorney LEE A. CHAGRA was in his office located at 910 North Mesa, El Paso, Texas. Prior to his death, MR. CHAGRA had more than 4,000 client files in his office, 500 to 1,000 of which were active files. Shortly after the discovery of MR. CHAGRA'S death, members of the El Paso Police Department, Crimes Against Persons (CAP) Unit, were on the scene and in fact secured the premises. Some time during the evening of the 23rd or in the early morning hours of the 24th of December, attorney Joseph Sib Abraham, the deceased's brother-in-law, did have a conversation at the scene with CAP Detective George P. Drennan and perhaps other CAP detectives. Mr. Abraham specifically advised Officer Drennan that client files should not be searched or reviewed because there were confidential and privileged communications in those files. Officer Drennan assured Mr. Abraham that his request would be honored.

Subsequent to the early morning hours of the 24th, only city law enforcement personnel, DEA agents, IRS agents, and members of the District Attorney's office, were allowed on the premises until the 28th day of December, with the exception of MR. CHAGRA'S secretaries, who were interviewed by detectives on the premises.

On or about December 26, the CAP detectives apparently resolved at a staff meeting that the premises would be "researched" thoroughly. That search included a review of less than 100 client files by Officer Drennan and several client files, each by several other detectives. All the witnesses except Detective Weick stated that they were aware that attorney-client communications were privileged.

The Office of the District Attorney was not requested by the CAP Unit to comment on the legality of the police search of the premises, nor was any advise volunteered. Mr. Gary Weiser, First Assistant District Attorney, admitted that a search warrant could not have been obtained for most of the files which were reviewed. Mr. Weiser stated that the CHAGRA death was investigated as any routine case would be, and that no special advise was requested or given. Mr. Weiser also states that since 1974, the Police Department had been authorized by the Office of the District Attorney, regardless of the circumstances of the case, that a murder scene may be sealed off and that anything and everything on the premises may be searched for as long as the police feel it necessary. As authority for that proposition, Mr. Weiser cited a letter and policy statement dated July 9, 1974, from the District Attorney (Exhibit 1), as well as Article 49.23 of the Texas Code of Criminal Procedure.

II.

Opinion

This Court's inquiry was initiated to investigate possible criminal misconduct. Specifically, the Court inquired into conduct which might violate Sections 39.01(a)(1) and 39.02(a)(1)(2) of the *Texas Penal Code*, the official misconduct and official oppression statutes which are misdemeanor offenses.

A. *Official Oppression.*

Section 39.02(a)(2) provides as follows:

> A public servant acting under color of his office or employment commits an offense if he . . . intentionally denies or impedes another in the exercise of enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.

There is no doubt in the mind of this Court that there was violation of Section 39.02(a)(2). The violation is most disturbing to the Court. It constituted a violation of one of the longest recognized rights in these United States, the ability to communicate confidentially with one's attorney with the knowledge that no one, I repeat, no one can violate the confidence except the client himself.

Prior to the Supreme Court's decision of *Warden v. Hayden*, 387 U.S. 294 (1967), a search warrant could

only be used to seize contraband, implements of crime, and fruits of crime, *Gouled v. United States*, 255 U.S. 298 (1921). It could not reach "mere evidence" of crime. But even in *Warden v. Hayden* the Court recognized that there were "items of evidential value whose very nature precludes them from being the object of reasonable search and seizure." 387 U.S. at p. 303. See also, *Boyd v. United States*, 116 U.S. 616 (1886); *Schmerber v. United States*, 384 U.S. 757, 768 (1966); and *United States v. Kirschenblatt*, 16 F.2d 202, 204 (2nd Cir. 1926).

B. *Official Misconduct and Oppression.*

Section 39.01(a)(1) provides:

> A public servant commits an offense if, with intent to obtain a benefit for himself or to harm another, he intentionally or knowingly (1) commits an act relating to his office or employment that constitutes an unauthorized exercise of his official power.

Section 39.02(a)(1) also makes it a crime for a public servant to intentionally conduct an illegal search or seizure.

I find that there was a violation of both these statutes in this case. The search conducted at the scene became illegal when it went beyond the immediate needs to secure the premises and secure the area. *Mincey v. Arizona*, 57 L.Ed.2d 290 (1978). There is no such thing as a "murder scene" exception for the Fourth Amendment and its requirements for a warrant.

The attempt by the District Attorney to give blanket authority to the police to circumvent the search warrant requirement is legally unjustifiable. Such a practice unnecessarily *violates rights* and *jeopardizes prosecutions.* It has long been recognized that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions," *Mincey v. Arizona.*

Article 49.23 of the *Texas Code of Criminal Procedure* does not give the police the authority to conduct the type of search they conducted of the CHAGRA law offices.

Conclusion

1. The Court finds there were criminal violations.

The type of search conducted in this case disturbs the Court and should disturb everyone. It would allow police to violate the files of a C.P.A., physician, lawyer, newspaper, clergy, banker, businessman, or anyone else.

2. *This Court strongly recommends that the District Attorney restructure the Policy Statement dated July 9, 1974 to conform with laws of the State of Texas and of the United States.*

It is often said that ignorance of the law is no excuse, when in fact and as a practical matter, it might be under some circumstances. Here there was professed ignorance by the police and District Attorney's Office.

3. Under the circumstances, this Court will not commence the criminal charges but does refer the entire record of this Court of Inquiry and this Order to the Office of the County Attorney so that he may determine if there is an offense which merits his prosecution.

By this Order this Court of Inquiry is terminated subject to reopening upon proper motion.

SIGNED AND ENTERED this 5th day of February, 1979.

WOODROW BEAN, II Judge
243rd Judicial District

IN THE DISTRICT COURT OF
EL PASO COUNTY, TEXAS
TWO HUNDRED FORTY THIRD
JUDICIAL DISTRICT

(Title Omitted)

ORDER

Comes now the Court on its own motion, pursuant to Article 52.01 of the Texas Code of Criminal Procedure, this Court of Inquiry being called because the Court has good cause to believe that an offense has been committed against the laws of the State of Texas in that there may have resulted improper disclosure and/or publication of privileged information given by clients to their attorney, Lee A. Chagra.

The Court hereby appoints Raymond C. Caballero as Amicus curiae to conduct, along with the Court, examination of the witnesses.

The Court, on its own motion, sets this matter for hearing on the 29th day of January, 1979, at 10:00 o'clock A.M.

SIGNED this 24th day of January, 1979, at 4:30 o'clock, P.M. in chambers.

WOODROW W. BEAN, II, Judge
243rd Judicial District

Supreme Court, U. S.
FILED
AUG 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1931

In the Supreme Court of the United States

OCTOBER TERM, 1979

DANNY BILL SANDER, a/k/a DANNY SANDER,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

United States v. *Morrision*, 602 F. 2d 529, cert. granted, No. 79-395 (June 30, 1980) 4, 5, 6

Weatherford v. *Bursey*, 429 U.S. 545 ..... 3, 4, 5

Constitution and statute:

United States Constitution, Sixth Amendment 3, 5

18 U.S.C. 1951 1

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1931

DANNY BILL SANDER, a/k/a DANNY SANDER,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the examination of his attorney's file by local police officers requires dismissal of his federal indictment.

1. After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of obstructing interstate commerce by extortion, in violation of 18 U.S.C. 1951. He was sentenced to seven years' imprisonment. The court of appeals affirmed (Pet. App. 1a-11a).

The evidence at trial is recounted in the opinion of the court of appeals (Pet. App. 2a-6a). It showed that D&B Development acquired a six mile square tract of land in El Paso County, Texas, and commenced operations in June 1978 for both residential and nonresidential

development. In October 1978, the land was annexed by the City of El Paso, and the tract was rezoned for residential purposes only. The rezoning made it virtually impossible for D&B Development to continue its operations, on which it had already spent two or three million dollars.

D&B Development applied to the Zoning Board of Adjustment for a two year temporary use permit to permit it to continue operations. Petitioner contacted Richard Knapp, one of the partners at D&B Development, and offered to speak with members of the Zoning Board to resolve the problem. Knapp discussed petitioner's offer with his attorney, and then contacted the legal authorities, who instructed Knapp to place recorded telephone conversations to petitioner. During these conversations, petitioner told Knapp that for $10,000 he could ensure that D&B Development would receive two or three favorable votes from the Zoning Board. Knapp told him to go ahead.

After D&B Development received a favorable vote on the permit, petitioner spoke to Knapp and told him he might "get some grief down the line" if he did not pay the money. It was agreed that Knapp would leave the $10,000 in a brown envelope at his office for petitioner to collect. As petitioner was leaving Knapp's office carrying the envelope, he was arrested. After being advised of his rights, he told the officers that he was only the middleman in the scheme and was acting for compensation.

Prior to trial, petitioner moved unsuccessfully to dismiss his indictment because of alleged police intrusion into his relationship with his attorney. A hearing on the motion revealed that petitioner had retained the services of Lee Chagra to represent him on the extortion charge. Shortly thereafter, Chagra was murdered in his office. The El Paso police assumed custodial possession of Chagra's

office for the next five days to investigate the murder. Detective Lattimer of the El Paso Police Department testified that, in the course of interviewing Chagra's secretaries, petitioner's name came up as a possible suspect. Lattimer then glanced through petitioner's file looking for addresses and any connection to the murder. Petitioner testified that he had given Chagra a handwritten statement, but Lattimer testified that he had seen no such handwritten document and that a typewritten statement discovered in the file was left there and supplied to petitioner before his trial. Lattimer also testified that he did not discuss the contents of the file with any federal agents and that no evidence was supplied to the government by Lattimer. Nothing contained in Chagra's files was ever used by the prosecution in this case (Pet. App. 10a).

The court of appeals found that petitioner had made no showing of injury or prejudice because of the examination of the file. Thus it held that the district court properly denied petitioner's motion to dismiss (Pet. App. 11a).

2. Petitioner contends (Pet. 5-11) that the indictment should have been dismissed because of the conduct of the El Paso police officer in viewing his file in Chagra's office. Because nothing found in the file was supplied to the federal government or used in the prosecution, the court of appeals correctly determined that petitioner suffered no Sixth Amendment deprivation requiring the dismissal of his indictment. See *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977).[1] The general question whether dismissal of an

---

[1]Petitioner does not dispute that no actual prejudice was shown. He suggests (Pet. 9-10), however, that he was deterred from taking the stand in his own behalf because he feared that the government possessed the handwritten statement, which the officer testified he had never seen and which the evidence clearly established could not have been in the hands of the prosecution. He does not suggest,

indictment can be an appropriate sanction for an interference with the attorney-client relationship that does not prejudice the accused in any way is presently before this Court in *United States* v. *Morrison*, cert. granted, No. 79-395 (June 30, 1980). We contend in *Morrison* that in the absence of prejudice, dismissal is never an appropriate sanction. Whatever the proper resolution of *Morrison*, however, dismissal of the indictment is not required in this case. Accordingly, it is unnecessary for the Court to hold this case pending its decision in *Morrison*.

In *Morrison*, DEA agents visited the defendant after she had been indicted on drug charges and had retained an attorney. They made disparaging remarks about her attorney and suggested that she obtain new counsel and consider cooperating with the government's investigation. The court of appeals held that the indictment should be dismissed because of "a deliberate attempt to destroy the attorney-client relationship and to subvert the defendant's right to effective assistance of counsel and a fair trial." 602 F. 2d 529, 533 (3d Cir. 1979). The court held that the rule of *Weatherford* v. *Bursey*, *supra*, rejecting dismissal of the indictment as an appropriate sanction, should be restricted to those situations "when there is *both* no prejudice to defendant's case *and* no wrongfully motivated intrusion into the attorney-client relationship." *Id.* at 532 (emphasis in original).[2]

---

however, why this statement should have deterred him from testifying or what he could have said in his testimony that could possibly have affected the outcome of the trial.

[2]In *Weatherford*, an undercover agent had been present at a meeting between a defendant and his attorney, but had not advised the prosecution of the substance of the conversation.

The motivation for the police conduct in this case was not destruction or interference with the attorney-client relationship, and therefore even the *Morrison* court would not have called for dismissal of the indictment. The local officer's examination of petitioner's file was in accordance with the El Paso Police Department's long standing authorization from the district attorney's office to search anything on the premises where a murder has been committed for as long as necessary (Pet. App. 15a). The inspection of the file was in furtherance of the purpose of investigating the murder. The file was reviewed only after the police had received information from Chagra's secretary focusing suspicion on petitioner in the murder investigation. Moreover, the brief review was limited to finding clues in the murder investigation, and therefore nothing in the file was either copied or made available to federal authorities responsible for the instant extortion prosecution. Clearly, the intrusion was not occasioned by improperly motivated police misconduct aimed at interfering with petitioner's Sixth Amendment rights in connection with the extortion prosecution. Rather, this case is quite similar to *Weatherford*. A police action unrelated to the prosecution did result in an intrusion into the attorney-client relationship, but one from which the prosecution derived no information or benefit.

The inappropriateness of dismissal here is further highlighted by the fact that the conduct complained of was that of local police officers. No legitimate purpose, deterrent or otherwise, can be served by dismissing a federal indictment because of the unrelated conduct of

local police officers,[3] and nothing in *Morrison* suggests that dismissal is required where the alleged misconduct is not perpetrated by agents of the prosecuting authority.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1980

---

[3]An inquiry into the events occurring in Chagra's office was undertaken by the State. A Texas court criticized the search, recommended that the district attorney's policy guidelines be revised, and referred the matter to the Office of the County Attorney to determine if criminal prosecution was warranted (Pet. App. 13a-19a). Thus, it is apparent that dismissal of the indictment here is not only an inappropriate way to deter future police misconduct, it is also unnecessary.

DOJ-1980-08